STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAREN SUE BOES,

Defendant-Appellant.

UNPUBLISHED
December 21, 2004

No. 248289
Ottawa Circuit Court
LC No. 02-026455-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and sentenced to life in prison without parole. She appeals as of right. We affirm.

Defendant's conviction arises from the death of her fourteen-year-old daughter, who died of smoke inhalation from a fire at their home. At trial, the prosecution presented evidence that the fire was fueled by an accelerant, such as gasoline; that it started in the hallway outside the victim's bedroom; and that the victim could not have started the fire and then retreated back into the bedroom where she died.

On appeal, defendant challenges the trial court's denial of her motion to suppress statements made to the police on August 7, 2002. She first contends that the officers failed to properly advise her of her *Miranda*[1] rights, which she claims were required because she was in custody at the time of the interviews.

Although a trial court's factual findings at a suppression hearing are reviewed for clear error, we review de novo the critical issue of whether a defendant was in custody at the time the statements were made. *People v Herndon,* 246 Mich App 371, 395; 633 NW2d 376 (2001). Police need give *Miranda* warnings only when an accused "is interrogated while in custody, not simply when he is the focus of the investigation." *Id.* Custodial interrogation occurs where law enforcement officers initiate questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, 395-396. A court properly determines that police held an accused in custody where, based on the totality of the

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

circumstances, the accused could reasonably have believed that he was not free to leave. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). In making such a determination, courts must examine the "objective circumstances rather than the subjective views harbored by the interrogating officers or the person being interviewed." *Id.*, 219-220.

Here, the totality of the objective circumstances establishes that defendant was not in custody when she gave her statements on August 7, 2002. The evidence indicates that she voluntarily arrived at the police post with her husband. She acknowledged that she was not under arrest and no formal restraints were placed on her movements. Before any interviews took place, officers told defendant she could leave at any time. They left defendant unattended at times and allowed her to talk with her husband when she asked to do so. Defendant never inquired about leaving or attempted to leave. Even after being told that the interviews were over, defendant requested further consultation with the police chief. She ultimately left the police station without being arrested. Objectively, the totality of the circumstances does not indicate that defendant reasonably believed that she was required to stay at the police post. We therefore affirm the trial court's determination that defendant was not in custody.[2]

Defendant also argues that her statements were not voluntary. "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). Although this Court's review is independent from that of the trial court, we will affirm the trial court's decision unless we are left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Court set forth a nonexhaustive list of factors to consider when determining whether a statement is voluntary. The list includes:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Snider, supra*, 417-418, quoting *Cipriano, supra*.]

The presence or absence of any one factor is not conclusive. *Sexton, supra*, 753.

[2] Because defendant was not in custody, it was unnecessary for the police to advise her of her *Miranda* rights. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). Nevertheless, we note that defendant was actually advised of her rights before the first interview of the day.

After reviewing the totality of the circumstances, we are not left with a definite and firm conviction that the trial court erred in determining that defendant's statements were voluntary. Defendant was forty-six years old and high school educated. She had no formal experiences with the police, but she had contact with them related to the victim. Although officers questioned her for more than eight hours, they gave her several breaks and allowed her to speak with her husband on two occasions. Moreover, the most confrontational part of the interview, the polygraph interrogation, lasted for only a short time. The evidence does not indicate that defendant was subjected to intensive, rapid-fire questioning over a long period. Rather, she spent most of the day speaking to the police chief, who she knew from the community and with whom she admittedly felt comfortable. Defendant even initiated further contact with him after being told the interviews were finished.

Further, defendant was not detained before her making her statement, but voluntarily appeared to give it. Defendant told the polygraph examiner that she was not on any medication, and her husband testified that she did not appear to be under the influence of medication. Although she later claimed that she had taken Prozac and Valium, there was no evidence that defendant behaved as if she was under the influence of drugs or that her abilities were affected. Moreover, defendant admitted that she felt fine when the interviews began, and there was evidence that she remained coherent and logical throughout the interviews, even when she became tired. The interviewers did not deprive defendant of food, sleep, or medical attention, and never physically abused or threatened to abuse her.

In sum, while the interviews were long and occurred the week after the victim's funeral, the totality of the circumstances supports the trial court's determination that the statements were freely and voluntarily made. We therefore affirm the trial court's ruling in this regard.

Defendant also challenges the sufficiency of the evidence supporting her conviction for felony murder. When reviewing the sufficiency of the evidence in a criminal case, we examine "the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn from it may constitute satisfactory proof of the elements of the offense. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). All conflicts with regard to the evidence must be resolved in favor of the prosecution, and this Court may not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felony murder include the following:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony-murder statute. [*People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000).]

Statutory arson, MCL 750.72, is an enumerated felony. *People v Barber*, 255 Mich App 288, 291 n 4; 659 NW2d 674 (2003). MCL 750.72 provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years.

Defendant argues that there was insufficient evidence that the victim's killing occurred during her commission of an arson. We disagree.

In *Wolford*, *supra*, 479-480, a defendant convicted of arson similarly argued that there was insufficient evidence to establish that the fire was not accidental or to prove that he started it. But tests performed on a carpet sample revealed the presence of accelerants and the fire investigator gave extensive testimony regarding his conclusion that the fire was intentionally set. *Id.*, 480. Additionally, the prosecution presented evidence that the defendant was outside the trailer approximately ten minutes before witnesses observed flames, he lied about calling the fire department, and made a joking statement about burning the dwelling. *Id.* 481. This Court concluded that sufficient evidence existed to establish that the fire was not accidental and that the defendant was responsible. *Id.*, 480-481.

In the instant case, the two expert witnesses presented by the prosecution agreed that the fire started in the hallway, rather than the victim's bedroom, and that the fire was necessarily fueled by an accelerant. They explained their positions in detail and specifically testified that the fire was not accidental. Although no evidence of an accelerant was discovered in the hallway, all of the expert witnesses, including one presented by defendant, acknowledged that a fire might consume all traces of an accelerant. All of the experts searched for accidental causes of the fire, but none were found. As in *Wolford*, sufficient evidence existed for a rational jury to conclude that the fire was intentionally set.

With regard to defendant's responsibility for the fire, the evidence indicated that only defendant and the victim were in the house at the relevant time. Defendant told witnesses that the victim was sleeping when she left the house at 8:55 a.m. and that she had entered the victim's bedroom and kissed her goodbye before leaving. A passerby who noticed the fire called 911 five minutes later. Several weeks before the fire, defendant told her husband that a gas can, which was ultimately found in the victim's bedroom, was missing. Traces of gasoline were found on a chair in the master bedroom that defendant occupied by herself. Moreover, the evidence showed that gasoline was poured around the victim's bedroom and an accelerant was used in the hallway outside the room, where the fire started. One of plaintiff's experts testified that the victim could not have started the fire in the hallway and retreated back into her room.

Furthermore, during police interviews and when speaking to her husband, defendant stated that she "could have" started the fire. She told numerous different versions of the events, and several witnesses heard her declare her hatred of the victim before the fire. Defendant also admitted that she had a violent streak directed toward the victim, and that she was upset on the morning of the fire. Moreover, within a week after the victim's funeral, defendant joked that she would be in jail.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant committed arson as defined in MCL 750.72. We therefore affirm her felony murder conviction.

Finally, defendant argues that the trial court denied her a fair trial by admitting three autopsy photographs into evidence. We review the decision to admit photographic evidence for abuse of discretion. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Although relevant evidence is generally admissible under MRE 402, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod, remanded 450 Mich 1212 (1995); MRE 403. Courts should exclude photographs under MRE 403 if they may lead the jury to abdicate its truth-finding function and convict due to passion. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). But photographs are not excludable solely because they are gruesome. *Mills, supra*, 76.

In the instant case, the three autopsy photographs were relevant to support the prosecution's theory of the case and negate the defense theory that the victim spread the accelerant and ignited the fire. These photographs were also referred to by the pathologist during his testimony and were instructive in depicting the nature and extent of the victim's injuries. Moreover, defendant has not met the heavy burden of showing that the challenged photographs should have been excluded as unfairly prejudicial. *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004). The trial court determined that the photographs were not so gruesome as to inflame the jury, and limited the number of photographs to minimize prejudice. In arguing that they should have been excluded, defendant relies solely on the gruesome nature of the photographs. Under *Mills*, this provides insufficient grounds for exclusion. The trial court did not abuse its discretion and the admission of the photographs did not deny defendant a fair trial.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello